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NO. 80-5674

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

PAUL ROLAND HAMILTON,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

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SUPREME COURT, U.S.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

SUPPLEMENTAL BRIEF IN
OPPOSITION FOR THE RESPONDENT

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SUPPLEMENTAL QUESTION PRESENTED

Whether this Court should deny certiorari due to the existence of two aggravating circumstances, both found beyond a reasonable doubt by the jury at trial?

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INTRODUCTION

Petitioner has filed a supplemental brief to this Court pursuant to Rule 22.6 of the Rules of this Court. Respondent files this Brief in response to the supplemental brief filed on behalf of the Petitioner.

REASON FOR NOT GRANTING THE WRIT

THE JURY IMPOSED THE DEATH PENALTY BASED ON THE EXISTENCE OF TWO STATUTORY AGGRAVATING CIRCUMSTANCES, THEREFORE, EVEN SHOULD THIS COURT DETERMINE THAT THE SEVENTH AGGRAVATING CIRCUMSTANCE IS NOT APPROPRIATE, PETITIONER'S DEATH PENALTY SHOULD STILL BE UPHELD.

As noted previously to this Court, Petitioner was sentenced to death after a jury found beyond a reasonable doubt that the offense of murder was committed while the Petitioner was engaged in the commission of another capital felony (in this case armed robbery) and that the offense of murder was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind, or an aggravated battery to the victim. Ga. Code Ann. § 27-2534.1(b)(2) and (7). After Petitioner's initial direct appeal, this Court vacated the judgment of the Supreme Court of Georgia and remanded for further consideration in light of this Court's decision in Godfrey v. Georgia, 446 U.S. ____, 100 S.Ct. 1759 (1980). Subsequent to the remand by this Court, the Supreme Court of Georgia reaffirmed the conviction and sentence in the instant case. The court determined that there were material differences between Godfrey and the instant case and upheld the imposition of the death penalty under the seventh aggravating circumstance. Hamilton v. State, 246 Ga. 264, ___ S.E.2d ___ (1980).

Petitioner has now filed supplemental briefs to this Court asserting that this Court should not deny the petition for certiorari even though an additional aggravating circumstance exists beyond the one set out in Ga. Code Ann. § 27-2534.1(b)(7).

Respondent asserts that the Georgia law is clear on the issue presented on this point. The Supreme Court of Georgia has held that even if the finding of some aggravating circumstances must be set aside, the death penalty will be upheld if there still exists one aggravating circumstance. Burger v. State, 245 Ga. 458, 460-61, 265 S.E.2d 797 (1980); Gates v. State, 244 Ga. 587, 599, 261 S.E.2d 349 (1979). This Court has denied a writ of certiorari in both of these cases. Burger v. Georgia, ___U.S. ___, 100 S.Ct. 2975, rehng. den., ___U.S.___, 101 S.Ct. 31 (1980); Gates v. Georgia, ___U.S.___, 100 S.Ct. 1332 (1980). Furthermore, in denying certiorari in an additional Georgia death case, Justice Stevens noted,

> "The Georgia Supreme Court . . . decided to adhere to its prior position that a death penalty imposed on the basis of a plurality of aggravating circumstances, each of which has been established beyond a reasonable doubt, will not be set aside simply because one of these aggravating circumstances is vulnerable . . . The Georgia Supreme Court's position is clear, and . . . I consider it consistent with this Court's decisions." Westbrook v. Balkcom, ___U.S.___, 49 U.S.L.W. 3371 (Nov. 18, 1980, (Stevens, J., concurring).

Thus, it is clear what the law in the State of Georgia is as to additional aggravating circumstances.

Petitioner attempts to allege a federal question based on a recent decision by the Fifth Circuit Court of Appeals involving a Georgia death penalty case. Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980). In that case, the Fifth Circuit determined that

the death penalty could not be imposed when one aggravating circumstance was held to be unconstitutional even though there were other aggravating circumstances existing. This Court should note that a motion for a rehearing is pending in the Fifth Circuit on the decision in Stephens based on the decision of this Court in Westbrook as well as the state law of Georgia. It is clear in considering the decision in Stephens, that the Fifth Circuit Court of Appeals misinterpreted certain provisions of the Georgia law in making its decision. Therefore, Respondent submits that this Court should not use the decision in Stephens as prevailing authority in the Fifth Circuit Court of Appeals.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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